Supreme Court, U. S.
FILED
MAY 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1667

DENNIS W. MULLIGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. JEFFREY WEISENFELD
MICHAEL YOUNG
GOLDBERGER, FELDMAN & DUBIN
Attorneys for Petitioner
401 Broadway, Suite 306
New York, N.Y. 10013
(212) 431-9380

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

TABLE OF CONTENTS

	Page
Decision Below	2
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Reasons for Granting the Writ	8
The Decision Below Is In Conflict With The Decisions Of This Court And Other Circuits As To The Disqualification Of Jurors For Misconduct, And The Nature Of The Inquiry To Be Held When Juror Misconduct Is Alleged.	8
Conclusion	23
Appendix A—Order Dated April 3, 1978	1a
Appendix B—Decision	2a

Cases Cited

Baker v. Hudspeth, 129 F.2d 779 (10th Cir. 1942)	9
Carpenter v. United States, 100 F.2d 716, 717 (D.C. Cir. 1939)	10
Clark v. United States, 289 U.S. 1 (1933)	20
Dennis v. United States, 339 U.S. 162 (1950)	8

Farese v. United States, 428 F.2d 178 (5th Cir. 1970) .. 8

Frazier v. United States, 335 U.S. 497, 505 (1948) 9

Gomila v. United States, 146 F.2d 372 (5th Cir. 1944) .. 8

Jackson v. United States, 395 F. 2d 615 (D.C. Cir., 1968) 9

Jordan v. Massachusetts, 225 U.S. 167 (1912) 20

Mares v. New Mexico, 490 P.2d 667 (Sup. Ct. of New Mexico, 1971) 8

Mikus v. United States, 433 F.2d 719 (2d Cir. 1970) ... 20

Parker v. Benson, 385 U.S. 363, 366 (1966) 9

Remmer v. United States, 347 U.S. 227 (1954) 20

Sheppard v. Maxwell, 384 U.S. 333 (1966) 8

United States v. Brown, 179 F. Supp. 478 (D.C. Cir. 1960) 9

United States ex rel. DeVito v. McCorkle, 248 F.2d 1 (3d Cir. 1957) 20

United States v. Dioguardi, 492 F.2d 70, 85 (2d Cir. 1974) 9

United States v. Floyd, 496 F.2d 982, 998 (1974) 20

United States v. Hand, 472 F.2d 162 (5th Cir. 1973) ... 21

United States v. Hill, 332 F.2d 105 (7th Cir. 1964) 9

United States v. Lampkin, 66 F. Supp. 821 (S.D. Fla. 1946) 20

United States v. Muncy, 526 F.2d 1261 (5th Cir. 1976) . 9

United States ex rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970) 21

United States v. Rakes, 74 F. Supp. 645 (D.C. Va., 1948) 9

United States v. Rattenni, 480 F. 2d 195, 198 (2d Cir. 1973) 8

United States v. Silverman, 449 F.2d 1341 (2d Cir. 1971) 21

Statutes Cited

18 U.S.C. § 1621 1

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1865(b)(4) 20

Other Authorities

Rule 24, Federal Rules of Criminal Procedure 9

New York Criminal Procedure Law §§ 110.10, 150.10 . 11

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 77-

DENNIS W. MULLIGAN,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

Petitioner, Dennis W. Mulligan, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 3, 1978, affirming a judgment of the United States District Court for the Southern District of New York, convicting petitioner of perjury in violation of 18 U.S.C. §1621.

DECISION BELOW

The decision of the Court of Appeals is not yet reported in the Federal Reporter. A copy of the Second Circuit slip opinion is reproduced as appendix B.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, §1254(1).

The judgment of the Court of Appeals, affirming the judgment of the District Court, was entered on March 3, 1978. A copy of the judgment is annexed hereto as appendix A.

QUESTION PRESENTED

1. Whether the bias, misconduct and incompetency of one of the jurors at the trial below deprived petitioner Mulligan of his constitutional right to a fair trial by an impartial jury.

2. Whether the withholding and/or unavailability of material information about one of the potential jurors during the jury voir dire deprived petitioner Mulligan of his statutory right to challenge jurors.

3. Whether the district court failed to conduct an adequate inquiry when the question of juror disqualification was raised.

STATEMENT OF THE CASE

One of the individuals selected from the panel to sit on the jury in this case was Virginia Stephenson. Unbeknownst to the defense, Ms. Stephenson had a history of factors which made her undesirable as a juror,

particularly in the trial of a New York City police officer such as petitioner Mulligan.

On November 15, 1973, Ms. Stephenson, angered at the fact that post office trucks at a post office building near her apartment were polluting the atmosphere, went to the post office to register a complaint. When she attempted to enter the truck loading area, she was stopped by a postal security guard, and a mailhandler, Joseph Scelza, who told her she would have to go to a different entrnace to see the supervisor about her complaint. Ms. Stephenson refused, and attempted instead to push past the postal employees, scratching Scelza on the face and stabbing him in the back of the head with a ballpoint pen. Scelza had to be taken to Bellevue Hospital for treatment, which included stitches. (These facts are set forth in the decision of Judge LaFauci, appellant's separate appendix at 282-285).*

As a result of this altercation, Ms. Stephenson was arrested by New York City Police and charged with a felony assault (a copy of the arrest report is set forth in appellant's separate appendix at 253, and the felony complaint at 258). She was searched, fingerprinted and held overnight by members of the New York City Police Department at the 17th Pct. (See arrest report, appellant's separate appendix at 253). The following day, she was taken to Criminal Court by a police officer and arraigned on his sworn complaint (see transcript of Criminal Court proceedings, appellant's separate appendix at 255.)

The criminal charges were eventually dismissed because Scelza was never advised as to when he was supposed to appear in court (see appellant's separate appendix at 262-66). Thereafter, Scelza filed and successfully prosecuted a civil action against Ms. Stephenson for the

---

* Unless otherwise noted, references are to petitioner Mulligan's appendix to the Second Circuit Court of Appeals.

injuries he suffered from her assault. Ms. Stephenson filed a counterclaim in that proceeding and testified under oath at the trial that Scelza had punched her in the stomach and chased her down the street. The trial judge found Ms. Stephenson's testimony "incredible." He denied her counterclaim, and awarded judgment to Scelza. (The judge's decision is set forth in appellant's separate appendix at 282-85).

At the beginning of the voir dire in this case, the prospective jurors were advised that those selected for this jury would be sitting in judgment over a member of the New York City Police Department (voir dire minutes, June 7, 1977, at 11-12). When the prospective juror immediately before Ms. Stephenson was asked whether he had ever been a defendant in a criminal proceeding, he answered that he had been charged with crimes twice, but that neither charge had resulted in a conviction. (This portion of the voir dire is set forth in appellant's separate appendix at 083-4). That individual was excused from the jury panel (*Id.* at 090). Moments later, when Ms. Stephenson was asked whether she had "ever been involved in a criminal case," she concealed her arrest and detention by members of the New York City Police Department, answering the question with an unqualified "No sir." (*Id.* at 092). Similarly, although she had been criminally charged and civilly sued for assaulting a United States postal employee, she denied at the voir dire having ever had "any disputes with the United States." (*Id.* at 092). Finally, although she had testified under oath in the civil court proceeding that she had been chased and punched in the stomach by Mr. Scelza and then falsely arrested by the New York City Police she stated at the voir dire that she had never been the victim of a crime (*Id.* at 092). Ms. Stephenson also failed to disclose at any time during the voir dire examination that she had been under psychiatric

treatment for five years.*

During the trial, Ms. Stephenson developed an infatuation for the assistant United States Attorney prosecuting the case. (See Stephenson letter, appellant's separate appendix at 078-81). On one occasion, she blew a kiss toward the prosecution table as the jury was leaving the courtroom (See appellant's separate appendix at 114-15). She conceived a plan whereby with the help of the prosecutor she would write a book about the government's chief witness, Frank Smith (*Id.* at 078). Rather than concentrating on the evidence, she was preoccupied during the trial with these plans and her own mental problems (*Id.* at 078-81).

When the jury began deliberating, it divided with eleven favoring acquittal on the charges** and Mr. Stephenson, the single holdout for conviction (*Id.* at 079). The jury remained deadlocked for two days. Finally, the jurors agreed to vote conviction on the first perjury count against petitioner Mulligan, although some of the jurors were not convinced of petitioner's guilt on that charge, in the hopes of thereby convincing the entire jury to vote for acquittal on the "more important [bank robbery] counts." (See letter of juror Bulos, appellant's separate appendix at 077). Immediately after the note, four of the jurors wanted to change to a vote of acquittal, but were talked out of it by the other jurors (Stephenson's letter, appellant's separate appendix at]79).

When the jury was excused, juror Stephenson went directly to the prosecutor's office, where she spoke at length with the case agent and the prosecutor himself (see

---

* See Stephenson letter, appellant's separate appendix at 078.

** In addition to the perjury count of which he was convicted, petitioner Mulligan was also charged with one other count of perjury, one count of bank robbery and one count of conspiracy to commit bank robbery.

Stephenson letter, appellant's separate appendix at 078).

Several days after the verdict was rendered, one of the jurors wrote to the judge, expressing his distress at the compromise verdict, and stating that he had voted "guilty" on the third count although he was "not convinced of the guilt at all." (See Bulos letter, appellant's separate appendix at 077).

A few weeks later, Ms. Stephenson sent a lengthy letter to the prosecutor, expressing her affection for him and inviting him to visit her. She described her role on the jury as being like that of a supporter of a political candidate (the prosecutor), doing her part to help him achieve election victory. She described her preoccupation during trial with her own emotional problems, and asked the prosecutor to help her in writing a book about "her character" Frank Smith, the government's principal witness in this case (see Stephenson letter, appellant's separate appendix at 078-81).

Upon the prosecutor's disclosure of this letter, the defense, with the court's permission, conducted a background investigation of Ms. Stephenson which revealed her prior criminal and civil proceedings.

The defense thereupon moved to set aside the verdict.* Although the trial court summoned Ms. Stephenson, it refused to inquire of her at any length concerning the relevant issues, or to allow counsel to question her (transcript of August 18, 1977, set forth in appellant's separate appendix at 139-42). When Ms. Stephenson was put under oath, her first statement was that she had "no idea" why she had been asked to come down (*Id.* at 143). When the judge explained to her that it concerned her voir

* The defense motion, supporting affidavit and memorandum are set forth in appellant's separate appendix at 227. The government's affidavit and memorandum in opposition are set forth at 242. Defendant's reply memorandum is at 320.

dire answers, however, Ms. Stephenson produced from her handbag papers relating to her prior assault charges (*Id.* at 145-46). When asked how she could have known to bring those papers if she had no idea why she had been summoned, she admitted that in fact the judge's secretary had told her that it concerned her voir dire answers (*Id.* at 148). She also admitted that she realized her denial at voir dire of any prior involvement in prior criminal proceedings "might be misinterpreted" in light of her prior assault charges.

Ms. Stephenson then stated that when the assault charges were dismissed, she was advised by her lawyer, Robert Dobrich, that if she was ever asked if she had been arrested or involved in criminal proceedings, she should answer "no." She also claimed that about that same time, she received a form to fill out concerning jury duty, and she specifically asked her attorney how this would affect her if she was called for jury duty. He said "You answer no." (*Id.* at 146). Ms. Stephenson also claimed, in response to the court's questions, that she didn't harbor any feelings against any party to this case, that she did not want to get on the jury so as to get back at the police department, and that the experience had not affected her impartiality (*Id.* at 146-47). Although she had testified at the civil proceeding that she had been chased and punched in the stomach by a postal employee, she claimed now that she did not regard herself as having been the victim of a crime during those events. Consequently, he had answered "no" when asked in voir dire if she had ever been the victim of a crime. (*Id.* at 149). Although defense counsel proposed a series of questions to test Ms. Stephenson's credibility, her competency and her possible prejudice against the defendant, the court refused to ask those questions (*Id.* at 148-153). The court then stated that it found Ms. Stephenson credible and unprejudiced and denied the defense motion to set aside the verdict (*Id.* at 154-55).

After speaking to Mr. Dobrich, Ms. Stephenson's attorney in her assault proceedings, the defense renewed the motion to set the verdict.* At a subsequent hearing, Mr. Dobrich testified that he had no recollection of his specific advice to Ms. Stephenson, but that, to the best of his recollection, he had never advised any of his clients, regardless of the disposition of their cases, that they could deny having been arrested (transcript of September 6, 1977, appellant's separate appendix at 184-85). Following Mr. Dobrich's testimony, the trial court again denied the defense motion to set aside the verdict.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS AS TO THE DISQUALIFICATION OF JURORS FOR MISCONDUCT, AND THE NATURE OF THE INQUIRY TO BE HELD WHEN JUROR MISCONDUCT IS ALLEGED.

"In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . " United States Constitution, Amendment 6. This provision entitles a defendant in a criminal proceeding to a trial in which "each and every one of the twelve members of the jury is totally free from any partiality whatsoever." *Mares v. New Mexico,* 490 P.2d 667 (Supreme Court of New Mexico, 1971); see also, *Dennis v. United States,* 339 U.S. 162 (1950); *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *United States v. Rattenni,* 480 F. 2d 195, 198 (2d Cir.,1973); *Farese v. United States,* 428 F.2d 178 (5th Cir. 1970); *Gomila v. United States,* 146 F.2d 372 (5th Cir. 1944);

* This motion and supporting affidavit are set forth in appellant's separate appendix at 333.

United States v. Hill, 332 F.2d 105 (7th Cir. 1964); *Baker v. Hudspeth,* 129 F.2d 779 (10th Cir., 1942). This Constitutional right is violated if even one juror is shown to be prejudiced. *United States v. Rattenni, supra,* 480 F.2d at 198; see also *Parker v. Benson,* 385 U.S. 363, 366 (1966); cf. *United States v. Dioguardi,* 492 F.2d 70, 85 (2d Cir. 1974) (Feinberg, J., dissenting). In judging claims brought under this provision, the courts have employed flexible tests adaptable to the facts of individual cases. Some courts, recognizing the difficulty of proof with regard to this issue, have afforded the defendant a new trial where the circumstances created a substantial possibility that one or more jurors were biased, without requiring the defendant to prove actual bias, or show how he was prejudiced. See e.g. *United States v. Brown,* 179 F. Supp. 478 (D.C. Cir. 1960); *United States v. Rakes,* 74 F. Supp. 645 (D.C.Va., 1948). In other cases, the decision of whether to grant the defendant a new trial has turned on whether the defendant was prejudiced. See, e.g., *United States v. Muncy,* 526 F.2d 1261 (5th Cir. 1976); *Jackson v. United States,* 395 F.2d 615 (D.C. Cir., 1968).

In giving substance to this Constitutional protection, the jury voir dire procedure has bee adopted and the defense is accorded the right to challenge prospective jurors, peremptorily or for cause (Rule 24, Federal Rules of Criminal Procedure). As the Supreme Court held in *Frazier v. United States,* 335 U.S. 497, 505 (1948):

> [T]he right [to peremptory challenges] is given in aid of the party's interest to secure a fair and impartial jury . . .

The test for judging whether this statutory right has been violated is somewhat different than the constitutional tests. When, as in this case, the claim of violation is based on the fact that certain information about a prospective juror's past was not available to the defense when it was deciding whether to challenge, then the question for the

court is whether that information, if disclosed, "would probably have induced counsel to strike" the prospective juror from the panel. *Carpenter v. United States,* 100 F.2d 716, 717 (D.C. Cir., 1939); cf. *United States v. Dioguardi,* 492 F.2d 70, 85 (2d Cir., 1974) (Feinberg, J., dissenting). ("A person who was known to regard herself as clairvoyant would certainly not be allowed on a jury in the first place.") Conclusive proof of bias need not be shown in order to satisfy this test. Rather, this court must take into consideration the fact that counsel will exercise his right to challenge peremptorily when the information about a prospective juror suggests even the possibility of bias.

Petitioner Mulligan was denied his Constitutional right to a trial by an impartial jury. Equally important, he was not afforded the information regarding potential bias and other disqualifications of juror Stephenson which was requisite to exercising his right to challenge her during jury selection. As previously noted, petitioner was a New York City Police detective. Consequently, the defense was particularly concerned during jury selection with the prior exposure potential jurors might have had to police or criminal proceedings. Any such exposure carried with it the possibility that the juror had thereby developed a bias against law enforcement officials which would manifest itself in bias against petitioner Mulligan in this case. Both the questions suggested by defense counsel and the colloquies conducted by the trial court during the jury voir dire established the importance of this issue in jury selection. Thus, one prospective juror was dismissed by the court when she indicated that three members of her family were in law enforcement and that this might affect her ability to sit as an impartial juror (voir dire minutes, June 7, 1977 at 44). When another prospective juror stated that he had been a victim of a mugging, both sides expressed concern over the effect this might have had on his attitude toward

New York City police officers. Counsel for petitioner Mulligan specifically requested the court to

> . . . ask the prospective juror whether or not after the mugging he had dealings with the police department, whether that was pleasant or unpleasant, whether he remembers any of the individuals from the police department. (Id. at 58)

It was only after the prospective juror explained that he had not reported the mugging and had not had any association with the police as a result of the incident that he was permitted to remain on the jury (Id. at 59). Another prospective juror who had been arrested twice on charges which were eventually dismissed, was called into the robing room for further questioning and then excused (Id. at 082-90). (See also the questions and colloquy, Id. at 11, 12, 14, 17, 18, 19, 20, 21, 25, 26, 33, 38, 39, 41, 54, 56, 57, 61, 63, 67, 70, 73, 74, 75, 77, 78, 81, 84, 87, 90, 94, 95, 97, 99, 100, 101, 103, 111-13, 114, 117, 121, 124, 125, 126, 128, as further evidence of the importance of this issue in jury selection in this case.)

Unbeknownst to the defense, one of the prospective jurors had had what could only have been a highly traumatic experience with the New York City Police less than four years ago. Virginia Stephenson, a middle aged, middle class woman had been charged with a felony assault. Rather than issuing an appearance ticket (New York Criminal Procedure Law §§110.10, 150.10 et seq.), New York City Police Officers arrested her, presumably handcuffed her, took her to the 17th Pct., searched her, fingerprinted her, and confined her there overnight. The next day she was taken into criminal court by a police officer and arraigned on his sworn complaint.

This was obviously precisely the type of adverse experience with the New York City Police that defense counsel was most concerned about. This court could take

judicial notice of the fact that arrest is a traumatic experience for anyone, but a first arrest on felony assault charges must have been particularly traumatic for this woman. The risk that an individual who has been through such an experience will harbor hostility against her custodians is substantial, particularly where, as in Ms. Stephenson's case, that individual has a history of mental problems. That Ms. Stephenson was particularly susceptible to such irrational hostilities is demonstrated by the fact that she physically assaulted a mail carrier because she thought that post office trucks were polluting her environment. That she harbored hostility over her arrest in this case is proven by the fact that she subsequently filed a counterclaim for false arrest in the civil suit initiated against her by the injured mail carrier.* Petitioner was constitutionally and statutorily entitled not to have a member of his jury infected by such experiences.

The district court appeared to believe that the question of whether appellant was entitled to a new trial depended primarily on whether juror Stephenson had perjured herself in concealing this information during voir dire. To the contrary, proof of perjury is not essential; rather, the fact that defense counsel was unaware of material facts relating to this juror's potential bias is sufficient to require that the jury verdict she participated in be set aside (See e.g., *Jackson v. United States,* 395 F.2d 615 D.C. Cir., 1968).

Appellant submits, however, that the fact that Ms. Stephenson willfully concealed her prior experiences with the police department and the courts is further proof of her bias. During the voir dire, Ms. Stephenson was specifically asked whether she had "ever been involved in a criminal proceeding?" Rather than describing her

---

* See appellant's separate appendix at 284.

assault charges, Ms. Stephenson answered with an unqualified "No sir."* There could not have been any serious question in Ms. Stephenson's mind that this question was designed to solicit descriptions of experiences such as hers. The court had previously advised the entire jury panel, including Ms. Stephenson, on no less than four occasions, that anyone who had "ever been involved" in "any kind of a criminal case' as a "defendant" should answer this question affirmatively (Voir Dire minutes, June 7, 1977, at 10, 17, 24-5, 35). Moreover, in questioning the other jurors in Ms. Stephenson's presence, the judge referred back to this definition six more times (Id. at 28, 63, 65, 67, 84, 97). Ms. Stephenson is a college-educated person who could reasonably be expected to know that a person who has been charged with a crime has been a "defendant" and "involved in a criminal proceeding" even if that charge was eventually dismissed. Moreover, the documents relating to the criminal proceedings against Ms. Stephenson, many of which she obviously observed, repeatedly referred to her as the "defendant." (See appellant's separate appendix at 253—"Complainant stated that the *above defendant* (listed as Stephenson, Ginger A.") did strike him . . . ; Id. at 254—"The People of the State of New York vs. *Ginger Stephenson, Defendant;*"

---

* Juror Stephenson also answered other questions during voir dire in a less than forthright fashion. Thus when asked if she had ever had "any disputes with the United States," she answered "no." In so doing, she concealed the fact that she had assaulted a United States Postal employee (first dispute), and formally charged with that assault (second dispute), and was civilly sued by that federal employee (third dispute). Similarly, when Ms. Stephenson was asked in voir dire whether she had "ever been the victim of a crime," she again answered in the negative. This was contrary to her sworn testimony in the civil suit to the effect that she had not assaulted the postal employee, but rather, he had chased her and punched her in the stomach.

(Id. at 258—" . . .the *defendant Ginger Stephenson* . . . Deponent states . . . that the *defendant* did with an unknown object strike one Joseph Scelza . . . "; Id. at 259—"The People of the State of New York vs. *Ginger Stephenson* . . . Defendants are charged with a violation of P.L. 120.05 Assault"; Id. at 260—"The People of the State of New York vs. *Virginia Stephenson, defendant*"; Id. at 262—"The People of the State of New York vs. *Ginger Stephenson, Defendant*"; Exhibit L—"*Defendant's last name Stephenson* first *Ginny*." Moreover, Ms. Stephenson was present in court for proceedings in her case on November 16, 1973 and November 17, 1973 when she was repeatedly referred to by her own attorney and the court as "defendant." (Transcript of these proceedings set forth in appellant's separate appendix at 254 and 262). It is therefore impossible that this juror did not know that she had been a defendant in a criminal proceeding.

After the defense filed its motion to set aside the verdict, the trial court summoned Ms. Stephenson and asked her why in light of her arrest on felony assault charges, she had denied at voir dire any prior involvement in criminal proceedings. Ms. Stephenson responded by claiming that she had been advised by her lawyer at the time the charges against her were dismissed that she could thereafter deny even having been arrested. This answer is suspect for several reasons. First, the New York statute nullifying criminal proceedings in the event of a dismissal (C.P.L. §160.60) was not enacted until 1976, more than two years after Ms. Stephenson claimed to have received this advice from her lawyer.* Secondly, her lawyer testified that

* Ms. Stephenson testified that she received this advice at the same time that she got her fingerprints back from the police, which was in 1974. Since Ms. Stephenson also stated that she had received a "form" about jury duty around that same time, the trial court er

although he did not recall what advice he had given to Ms. Stephenson, he did not remember ever having told any client, even after the enactment of §160.60, that they could deny an arrest.* Finally, Ms. Stephenson was advised by the trial judge's secretary, in advance of the post-trial hearing, that she was to be questioned at that hearing about her answers to the voir dire questions. She knew that her answer to the question about prior involvement in criminal proceedings "might be misinterpreted" and that she would therefore have to come up with some explanation as to why she had concealed information in answering that question. Moreover, she spoke to her own attorney immediately in advance of the post-trial hearing. Consequently, there is a substantial possibility that her answer to the judge's query was a recent fabrication to justify her voir dire answers. It is significant in this regard that Ms. Stephenson had previously lied under oath at the civil proceeding brought by the postal employee she had assaulted.**

In the context of this case, however, the question of whether Ms. Stephenson actually knew about the provisions of CPL 160.60 is secondary. Even if she believed that she could legally conceal her past experiences with the police and the courts from prospective employers and the like, her failure to disclose those experiences during the voir dire in this case was still indicative of bias. She was advised that this was a case involving a New York City

roneously concluded that that "form" must have been her summons for duty in this case, and that the advice she described had therefore been given more recently, after CPL §160.60 was adopted.

* Interestingly, the statute specifically requires persons to disclose information about dismissed cases when questioned by a "superior court." Obviously, the district court's voir dire constituted questioning by a superior court.

** The civil court judge's opinion finding her testimony "incredible" is set forth in appellant's separate appendix at 284.

police officer. She had heard prior prospective jurors specifically questioned about any experiences they had had with New York City police. Most importantly, when the prospective juror immediately before her was asked about prior involvements in criminal proceedings, he had answered that he had been arrested twice, even though both times the charges had been dismissed. Consequently, Ms. Stephenson knew that that juror had as much justification for concealing the fact of his arrests as she did. However, when that juror answered that he had been arrested, the trial court acknowledged the importance of his answer by taking him into the robing room for further questioning and then excusing him. Thus, it was abundantly clear to Ms. Stephenson that the court and counsel egarded such arrests as highly important, and that she was expected to disclose that information even though the charges had been dismissed. Consequently, her only real motive for concealing this information was because she feared that, like the prospective juror before her, she would probably be excused from the trial of this police officer if she disclosed it.

Other evidence of Ms. Stephenson's bias against the defendant surfaced during and after trial. On one occasion, as the jury was filing out of the courtroom, she blew a kiss toward the members of the prosecution team.* Immediately after the jury was dismissed, this supposedly "impartial" juror proceeded directly to the prosecutor's office, where she spoke at length with the case agent and the prosecutor himself. Shortly thereafter, she wrote to the prosecutor**indicating that, rather than serving as an im-

* Although this incident was witnessed only by two defense attorneys, the fact that they called it to the court's attention long before Ms. Stephenson wrote her post-trial letter or the defense learned of her prior encounter with the police indicates that they did not make this incident up merely to discredit her.

** This letter is set forth in its entirety in appellant's separate appendix at 078-081.

partial juror, she envisioned her role at trial as that of a partisan for the prosecution. Analogizing the trial to a political election campaign, she stated:

> What happened to me as a juror was totally unexpected—from the first gasp of surprise at being chosen, the exhilaration of the trial itself, the agony of deliberation, my tremulous talk with Agent Walker immediately following the trial, to the final moments in your office. I wish I could have spoken to you more extensively at that time. But the circumstances were not unlike being in the "inner office" of a candidate, whom you've worked for and believed in, at the moment of victory. There is little time to say much to those immediately surrounding the candidate—but the thrill of just being there defied description. Thank you for letting me share in your "victory." I just hope you meant it when you said you were happy with our one count of perjury. I, of course, wish your victory had been complete. I wish we could have convicted on all counts.

In addition to her bias against the defendant, other factors which have been belatedly revealed about Ms. Stephenson further substantiate her incompetency as a juror. As previously mentioned, she testified falsely under oath in the civil suit brought against her by the postal employee she had assaulted. She was under psychoanalysis for five years. Her post-trial letter to the prosecutor vividly portrays her mental and emotional problems. In it, she expresses an infatuation for the prosecutor:

> It is difficult to formulate what I wish to say to you, tho' I am normally more facile at the written word than the spoken. I owe you a great debt of gratitude, Ira Block. A debt to be shared in part with Agent Walker, Mike Roche, Judge Owen, even my fellow jurors, and yes, "my character," Frank Smith. But it is you who stand out in greatness.

* * *

. . . But Ira (I hope you don't mind my calling you Ira. I do feel rather close to you after all this) . . .

• • •

Am enclosing my card. Please give me a call at your earliest convenience. Or, if you're ever in the neighborhood drop in for a cup of coffee (altho' I don't drink that either, but I'll settle for a Coke)—I'd still like very much to talk with you.

• • •

Again, Ira Block, I thank you—for so very much.

The letter further revealed that, rather than focusing on the evidence, this juror was preoccupied during trial with her own problems:

You restored conviction (or, faith, if you will) to a fellow human being. That is greatness. You succeeded in doing something that five years of analysis with a brilliant doctor could not do.

As I told you, the weekend before our final deliberations on Monday, I literally descended into hell. I dredged up five years of analysis and then some. I went through a complete catharsis of the soul. It was not pleasant. And I had to do it alone. But I came out a different person—or more accurately, the person I once was.

I regained my self-confidence. I *believed,* for the first time in years, in myself (my talent, my ability, my system of values). I believed with all my heart that I was right, despite the fact that eleven other people said I was wrong.

The bulk of the letter describes Ms. Stephenson's desire to capitalize on the conviction she had secured by inducing the prosecutor to aid her in writing a book about the government's principal witness in this case:

But the most important thing (selfishly, perhaps) to come out of all this is that I've begun to write again . . .

Friday, July 1, was my birthday. And for the first time in years I felt it was a real *birth*-day. And it was a happy one.

I was the me I started out to be. I'm writing again! Eagerly. Avidly. With enthusiasm! I am deeply involved in a project I firmly believe in (my Frank Smith book). Thank you, Ira Block—that's a heck of a birthday present!

Remember when I spoke to you the Friday following the trial? You said you'd speak to Smith's attorney the next week, but I said, "No, there's too much preliminary work to be done first." Actually what I was saying was that I ha to be sure of *me* first. that this wasn't just some transitory thing. "Post-trial exhilaration syndrome," if you will . . .

You were right. I'm not going to get anything out of the newspapers that I don't already know . . . I'm ready now, Ira. I am convinced I can *do* it!

She then proceeded to ask the prosecutor to do certain favors for her:

So, you, to whom I am already so deeply indebted, I turn to and ask, "May I extend that debt a little further?"

She requested that the prosecutor help her get in touch with Frank Smith's attorney, that he advise her if Mr. Smith was going to testify in any future trials, that he provide her with "leads" for her book and that he help her gain access to the transcripts of Mr. Smith's testimony from prior trials. The last full paragraph of the letter is indicative of its general tenor:

It's getting very late—and sitting in an un-airconditioned, un-windowed office tends to make the Muse's voice a little hoarse. But Ira, we've got one hell of a book! And just think, the government's going to get its money back triple fold. First I'm going to pour my "jury money" back into the economy by buying an electric typewriter for my apartment (already have one picked out). Next, we make enough money on the royalties and Frank Smith will never have to rob another bank. Next, we make *that* much money on royalties, as a single person, non-head-of-household-type tax payer the government's going to *tob*

me! Which may make me want to go out and rob a bank—which will pay the salary of some assistant US prosecutor, not to mention countless FBI agents. So, you see, one way or the other, it's all for the good of the country!

It is of some relevance to this appeal that Congress and the Courts have acknowledged a correlation between mental stability and jury qualification. 28 U.S.C. §1865(b)(4) provides for the disqualification of potential jurors who are "incapable, by reason of mental . . . infirmity, to render satisfactory jury service . . . " See e.g., *Jordan v. Massachusetts,* 225 U.S. 167 (1912). In the present case, the tenor of Ms. Stephenson's letter, the mental and emotional problems she described, and the fact of her lengthy period of admittedly unsuccessful psychoanalysis, all suggest that it was difficult, if not impossible for her to function as a fair and impartial juror.

Coupled with the evidence of her bias, her perjury in the civil court proceedings and her plans to capitalize financially on the conviction, these factors clearly establish that Ms. Stephenson's presence on this jury violated appellant's right to fair and impartial deliberations by competent jurors. *Clark v. United States,* 289 U.S. 1 (1933); *United States v. Floyd,* 496 F.2d 982, 998 (1974); *Jackson v. United States,* 395 F.2d 615 (D.C. Cir. 1968); *United States ex rel. DeVito v. McCorkle,* 248 F.2d 1 (3d Cir. 1957); *United States v. Lampkin,* 66 F. Supp. 821 (S.D. Fla, 1946); cf. *Mikus v. United States,* 433 F.2d 719 (2d Cir. 1970).

In light of this evidence of bias, incompetency and misconduct, the courts below were clearly in error in concluding that petitioner was not prejudiced by Ms. Stephenson's presence on the jury. The belief interview the district court conducted with Ms. Stephenson clearly did not constitute the hearing to which petitioner was entitled. See, e.g., *Remmer v. United States,* 347 U.S. 227 (1954);

United States v. Hand, 472 F.2d 162 (5th Cir., 1973); *United States v. Silverman,* 449 F.2d 1341 (2d Cir. 1971); *United States ex rel. Owen v. McMann,* 435 F.2d 813 (2d Cir., 1970). The trial court refused to ask most of the questions suggested by counsel concerning the facts relating to her arrest and detention, the credibility of the reason she gave for concealing the fact of her arrest during voir dire, and other issues. The court also refused to allow defense counsel to question Ms. Stephenson. Rather, the court limited the inquiry to eliciting from Ms. Stephenson brief explanations of why she had answered as she did in voir dire, and asking her in general terms whether she was biased by her experiences. Courts have reportedly recognized "the normal juror's disinclination to impeach his rendered verdict . . . " *United States v. Rattenni, supra,* 480 F.2d at 198; see also, *United States v. Rakes, supra,* 74 F. Supp. at 648. This was especially true in this case, where Ms. Stephenson, in her letter, expressed a vested interest in preserving this prosecutor's "victory," thereby repaying her "debt" to him as well as protecting her own literary prospects. Consequently, Ms. Stephenson's self-serving denials of prejudice wre as unenlightening as they were predictable. Particularly since no follow-up questions were asked to determine the credibility of those denials, they cannot serve to contradict the substantial evidence of bias and incompetency which exist in this record.

The government cannot dispute that this was a close case in the eyes of the jurors who sat on it. The first jury deadlocked on all counts and a mistrial was declared. At the second trial, the jury remained deadlocked through two days of deliberations and an *Allen* charge. According to juror Bulos, the final verdict was a compromise, with at least some of the jurors unconvinced of appellant's guilt. Ms. Stephenson herself admitted that through most of the

deliberations she was the only hold-out for conviction on some, and perhaps all, of the charges.

Given the "crucial importance of protecting the integrity of the trial process," Courts, when confronted with evidence of possible jury bias, should not hesitate to order a new trial, even though the proof of guilt was overwhelming. See, e.g., *United States v. Rattenni, supra,* 480 F.2d at 198. Here, the closeness of the case and the pivotal role Ms. Stephenson played in the deliberations require that special emphasis be given to the proof of her bias, incompetency and misconduct. As a result of his conviction, petitioner Mulligan has been sentenced to a substantial term of incarceration. Before he can be subjected to such punishment, he is constitutionally entitled to have the question of whether he is guilty resolved by an impartial jury of competent individuals. By virtue of juror Stephenson's adverse experience with the New York City police, her assaultive behavior, her criminal and civil court proceedings, her perjured testimony in civil court, her mental instability, her concealment of information during jury voir dire, her infatuation with the prosecutor in this case, her preoccupation with her own mental problems during trial, and her hopes to capitalize financially on petitioner's conviction, petitioner was denied this fundamental right. The verdict so rendered should be set aside and a new trial ordered.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

J. JEFFREY WEISENFELD
MICHAEL YOUNG
GOLDBERGER, FELDMAN & DUBIN
401 Broadway, Suite 306
New York, New York 10013
(212) 431-9380

New York, New York
May 3, 1978

APPENDIX A

ORDER DATED APRIL 3, 1978

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of April, one thousand nine hundred and seventy-eight.

Present: Hon. Henry J. Friendly; Hon. Ellsworth A. Van Graafeiland
Circuit Judges.
Hon. John F. Dooling, District Judge

Docket No. 77-1422

United States of America,

Plaintiff-Appellee,

v.

DENNIS W. MULLIGAN, JOHN ANTHONY CERASANI,

Defendants,

DENNIS W. MULLIGAN,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO, Clerk
By [s] Arthur Heller, Deputy Clerk

APPENDIX B
DECISION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 585—September Term, 1977.
(Argued January 10, 1978 Decided April 3, 1978)
Docket No. 77-1422

UNITED STATES OF AMERICA,

Appellee,

v.

DENNIS W. MULLIGAN,

Defendant-Appellant.

BEFORE:

FRIENDLY and VAN GRAAFEILAND, *Circuit Judges,*

and DOOLING,* *District Judge*

Appeal from a conviction for the making of a false declaration, 18 U.S.C. §1623, following a jury trial in the

---

* Honorable John F. Dooling, Senior District Judge of the United States District Court for the Eastern District of New York sitting by designation.

United States District Court for the Southern District of New York.

Affirmed.

Michael Young, New York, N.Y. (Goldberger, Feldman & Dubin), *for Appellant.*

Ira H. Block, Assistant U.S. Attorney (Robert B. Fiske, Jr., U.S. Attorney for the Southern District of New York; Audrey Strauss, Robert J. Jossen, Ass't U.S. Attorneys, of counsel), *for Appellee.*

VAN GRAAFEILAND, *Circuit Judge:*

After appellant's first trial ended with the jury deadlocked on all counts, he was retried on a four count indictment[1] before Judge Owen in the United States District Court for the Southern District of New York. At the close of the second trial, appellant was convicted on one count of making a false declaration under oath to a grand jury in violation of 18 U.S.C. § 1623. The jury failed to reach a verdict on another false declaration count and on the remaining counts of bank robbery and conspiracy to commit bank robbery. Appellant advances several arguments for reversal, the most serious of which concerns the asserted partiality of a juror.

Appellant, a former New York City policeman, and his co-defendant, John Cerasani, were charged with the 1971 robbery of a branch of the First National City Bank in New York City. The Government's proof on this issue consisted largely of the testimony of two witnesses, Frank Smith and Martin Shannon, who had admitted their own

---

1. The indictment contained seven counts, but three of them were redacted prior to trial.

participation in the robbery and hoped to receive lenient treatment in return for their testimony. In 1976, appellant was called before a grand jury that was investigating the robbery. He was informed that he was a target of the investigation and was advised of his constitutional rights. His conviction for perjury was based on his subsequent testimony that he did not recognize Cerasani's name or photograph.

A few days after the trial which resulted in appellant's conviction, Judge Owen received a letter from one of the jurors stating that the verdict on the perjury count had been reached by compromise. According to the writer, he and several other jurors had not been convinced of the appellant's guilt but had voted to convict on the seemingly unimportant perjury count in the hope of obtaining a unanimous acquittal on the remaining counts.

Shortly thereafter, the Assistant U.S. Attorney who tried the case received a long and effusive letter from another juror. In this letter, the juror expressed her thrill at having participated in the trial, her admiration for both the prosecutor and the judge, her restored faith in the judicial system and her satisfaction with the verdict of conviction. She also disclosed that she had begun to write a book which would be a fictional portrayal of the witness Smith, and she asked for assistance in obtaining transcripts of Smith's testimony at prior trials. After counsel for appellant were given a copy of the letter, they decided to delve more deeply into the background of its author.

They discovered that in 1973 she had a dispute with a United States Postal Service employee. Angered because postal trucks were being parked near her apartment with their motors running, she went to the post office to complain. On the way, she got into an argument with the employee and struck him, inflicting a minor laceration

with a ball-point pen which she had in her hand. She was arrested by the New York City Police and charged with felonious assault, after which she was fingerprinted and held overnight for arraignment on the following day. The criminal charges were subsequently dropped, but the postal employee brought a civil suit against her and recovered compensation for his injury.

Because the juror denied on her voir dire that she had had any disputes with the United States or that she had "ever been involved in a criminal case," appellant argued that he was entitled to a new trial. He contended that the juror had perjured herself during voir dire and that, as a result of the undisclosed incident, she must have become biased against New York City policemen. He also contended that her somewhat unusual letter showed that she had mental and emotional problems which prevented her from performing her duty as a juror. In view of the closeness of the case which assertedly had resulted in a "compromise verdict," appellant submitted that Judge Owen was required to set the verdict aside.

Before ruling on appellant's motion, Judge Owen called the challenged juror to the courthouse for questioning. He permitted counsel to be present and to suggest questions, but he did the interrogating. He asked the juror why she had denied on voir dire that she had been involved in a prior criminal case. She responded that after the charges were dropped, her lawyer told her that she could honestly say that she had not been involved in a criminal case. She said that she specifically asked her lawyer "What about if they ask me if I was ever arrested?" The lawyer reportedly responded, "You say no, because technically you were not." Indeed, she claimed to have asked her lawyer "How will this effect me if I am called for jury duty?" The lawyer reportedly assured her that it would have no effect.

Judge Owen then asked her whether she had had any view on the merits of the case before it began or whether she had harbored any feelings against any party. She replied in the negative. The following dialogue ensued:

> Q: Was there any reservation in your mind about wanting to get on to this jury so that you could get back at the Police Department or any member of it?
>
> A: Oh, no, sir. I had no grudge with the Police Department. I was treated very well, quite frankly. It was an experience that I otherwise—I thought, I don't want to go to jail again, but it was an experience . . .
>
> Q: Did that experience in any way leave any mark on you that affected the impartiality that you brought to the case starting in the beginning?
>
> A: Oh, no, sir. That—that's been so many years ago and I have no grudge against the Police Department whatsoever.

At the conclusion of his interrogation, Judge Owen denied appellant's motion for a new trial. He found that the juror's responses on voir dire were not false but were based on the good faith belief that she was entitled to treat the prior criminal case as a nullity. He further found that she did not conceal any animus against any party to the case in order to get on the jury.

Appellant's counsel was not satisfied. After speaking with the juror's lawyer, he persuaded Judge Owen to call the lawyer for questioning. The lawyer stated, in response to Judge Owen's inquiries, that he had represented the juror in the 1973 proceedings and that after the charges against her were dropped, he helped get her fingerprints back from the police department. Although he was unable to recall the specific advice he gave her on the subject of her arrest, he admitted that the conversation which she described "certainly could have taken place."

Following this testimony, Judge Owen again denied appellant's motion to set aside the verdict, reiterating his

belief in the juror's good faith. Appellant now asserts that this was error. We disagree.

A defendant is entitled to be tried by a fair and impartial jury, *United States v. Rattenni,* 480 F.2d 195, 198 (2d Cir. 1973), and to exercise knowledgeable challenges in the pursuit of this judicial ideal. *Jackson v. United States,* 408 F.2d 306, 308-09 (9th Cir. 1969). It does not follow, however, that every incorrect answer given on voir dire calls inexorably for a new trial; the question of bias and resultant prejudice remains to be determined. *Id.* at 309; *see also United States v. Robbins,* 500 F.2d 650 (5th Cir. 1974); *United States v. Sockel,* 478 F.2d 1134, 1136-37 (8th Cir. 1973); *United States v. Woods,* 364 F.2d 481, 483 (3d Cir.), *cert. denied,* 385 U.S. 972 (1966); *United States v. Eury,* 268 F.2d 517, 521-22 (2d Cir. 1959). If the answer was given in good faith with no deliberate intent to mislead, the trial court may well find that no prejudice resulted, even though the lack of disclosure might have impaired defendant's right to exercise a knowledgeable peremptory challenge. *Williams v. United States,* 418 F.2d 372, 376-77 (10th Cir. 1969); *Jackson,* 408 F.2d at 308-09; *Ryan v. United States,* 191 F.2d 779, 782 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 928 (1952).

Judge Owen found that the juror's failure to disclose her prior arrest resulted from her good faith belief that she was not required to do so. This finding of fact was based upon his assessment of her demeanor, and it should not be set aside unless clearly erroneous. See *Boscarino v. Nelson,* 518 F.2d 879, 882 (7th Cir. 1975). Although the question of juror impartiality is a mixed question of law and fact, the trial court's findings of impartiality will be set aside only where "manifest" prejudice to the defendant has been shown. *Mikus v. United States,* 433 F.2d 719, 723 (2d Cir. 1970). We agree with the district judge that there was no such showing in this case. The juror's

brief brush with the law, arising out of a dispute with a government employee some four years before trial, could not be expected to prejudice her against a defendant similarly at odds with the forces of government. Indeed, as Judge Owen pointed out, the expectation would be to the contrary. There is nothing in the history of this event to indicate that the juror was prejudiced against policemen as a class. *See Eury,* 268 F.2d at 522.

Appellant's contention that the juror was disqualified from sitting because of mental and emotional instability is not persuasive. Her somewhat discursive letter falls far short of establishing such lack of qualifications. *See United States v. Dioguardi,* 492 F.2d 70, 78-79 (2d Cir.), *cert. denied,* 419 U.S. 873 (1974). Her expressed intention of writing a work of fiction shows neither mental instability nor a predisposition to convict. The outcome of any trial which might be included in her work of fiction could be whatever she willed it to be.

Needless to say, the letters which indicated that the jurors on their own might have reached a compromise verdict did not warrant the granting of a new trial. *United States v. Green,* 523 F.2d 229, 235-36 (2d Cir. 1975), *cert. denied,* 423 U.S. 1074 (1976); *United States v. Grieco,* 261 F.2d 414 (2d Cir. 1958), *cert. denied,* 359 U.S. 907 (1959).

Appellant presses two other claims which merit but brief discussion. At trial, the Government introduced only a portion of the grand jury minutes—the initial warning to appellant that he was a target of the grand jury's investigation and had certain constitutional rights, and the particular statements alleged to be perjurious. Appellant objected and asked that his entire testimony before the grand jury be introduced.

We have said that "the prosecution is not required to offer the defendant's entire grand jury testimony so long as 'the statements are given sufficiently in their context so

as not to confuse the trier.' " *United States v. Capaldo,* 402 F.2d 821, 824 (2d Cir. 1968), *cert. denied,* 394 U.S. 989 (1969) (quoting *United States v. Rosenblum,* 339 F.2d 473, 475 (2d Cir. 1964). Whether appellant's denial of recognition was true or false was a simple, clear-cut question. We are satisfied that the Government introduced all of his testimony that "tend[ed] to explain and shed light on the meaning" of the statements at issue. McCormick, *Evidence* §56 at 131 (2d ed. 1972). *See United States v. Dennis,* 183 F.2d 201, 229-30 (2d Cir. 1950), *aff'd.,* 341 U.S. 494 (1951); 7 Wigmore, *Evidence* §2113 at 523 (3d ed. 1940). Judge Owen offered to consider the relevance and admissibility of further portions of appellant's testimony, but appellant's counsel declined the opportunity to suggest this additional testimony, demanding all or nothing. We believe that appellant's entire testimony was "not essential to a fair and impartial understanding of the statements read." *Capaldo,* 402 F.2d at 824. Accordingly, it was within the discretion of the trial judge to exclude it. *Id.*

Appellant also urges that the district court erroneously withdrew some of the required elements of the perjury count from the jury's consideration. The trial judge correctly instructed the jury that the Government had to establish the following four elements:

> 1. That Mr. Mulligan took an oath to testify truthfully before a United States grand jury in the Southern District;
>
> 2. That he made false statements as to matters about which he testified under oath as are charged in the indictment;
>
> 3. That those false statements were wilfully made in that at the time he made them he knew them to be false;
>
> 4. As to the matters which it is charged he made false statements, those matters were material to the issues under inquiry by that grand jury.

The Judge then stated:

> In this case, as the evidence shows, and there is no serious dispute, Mr. Mulligan did appear before a grand jury for the Southern District of New York and took an oath that he would testify truthfully and that such grand jury was authorized by law to administer oaths.
>
> . . . I charge you as a matter of law that the matters as to which Mr. Mulligan was asked as set forth in the indictment were material to the issues under inquiry before the grand jury before which the testimony was given. Therefore, you need not concern yourself with either the first or the fourth elements with which I have just outlined for you. You should direct your attention to the second and the third elements. . . .

Appellant's counsel argues that the trial court erred in removing elements 1 and 4 from the jury's consideration. This contention is meritless. It was not error to withdraw the materiality issue from the jury because materiality is a question of law. *United States v. McFarland,* 371 F.2d 701, 703 n.3 (2d Cir. 1966), *cert. denied,* 387 U.S. 906 (1967).

The Government contends that the district judge did not withdraw the first element from the jury but merely commented that there was no serious dispute over whether appellant appeared before the grand jury and took an oath to testify honestly. In support of this argument, it points to the following comments of defense counsel in his closing:

> Dennis Mulligan testified in the grand jury. Do you know you have a right to refuse to testify in the grand jury? You have an absolute right to say no, I am not going to testify unless you grant me immunity. He had nothing to hide. He raised his right hand and told the truth and testified.

We need not resolve this dispute. Defense counsel never objected to this portion of the charge, and we

decline to exercise our discretion to notice the asserted error. *Compare United States v. Pravato,* 505 F.2d 703, 705 (2d Cir. 1974), with *United States v. Howard,* 506 F.2d 1131, 1134 (2d Cir. 1974).

The judgment of conviction is affirmed.